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1   RECORD OF ORAL HEARING
2
3   UNITED STATES PATENT AND TRADEMARK OFFICE
4   ————————
5
6   BEFORE THE BOARD OF PATENT APPEALS
7   AND INTERFERENCES
8   ————————
9
10   Ex parte RICHARD O. SHULER, LYNN GODBERSEN,
11   JAMES NORWOOD, JOSEPH YOUNG, WILLIAM FLECK,
12   DAVID LIND, KEVIN DEHAAN, THOMAS NICHOLSON,
13   and MARCELL J. SARZEN
14   ————————
15
16   Appeal 2008-1979
17   Application 09/909,587
18   Technology Center 3600
19   ————————
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21
22   Oral Hearing Held: October 22, 2008
23   ————————
24
25
26 Before MURRIEL E. CRAWFORD, HUBERT C. LORIN, and STEVEN

27 D.A. McCARTHY, Administrative Patent Judges

28

29
30 ON BEHALF OF THE APPELLANT:
31
32   JON JURGOVAN, ESQUIRE
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36   Charlotte, NC 28280-4000

1   The above-entitled matter came on for hearing on Wednesday, October 22,

2   2008, at the U.S. Patent and Trademark Office, 600 Dulany Street,

3   Alexandria, Virginia, before Virginia Johnson, Freestate Reporting, Inc.

4

5   P R O C E E D I N G S

6

7   JUDGE CRAWFORD: Good morning.

8   MR. JURGOVAN: Good morning. How are you?

9   JUDGE CRAWFORD: I'm good. How are you?

10   MR. JURGOVAN: Good, thank you.

11   JUDGE CRAWFORD: We've had an opportunity to discuss the case,

12   so we're familiar with the issues.

13   MR. JURGOVAN: Okay.

14   JUDGE CRAWFORD: So you can begin whenever you're ready.

15   MR. JURGOVAN: Okay, thank you. If I may approach the Board,

16   I've got some PowerPoint materials here that would help you kind of walk

17   through what I'm going to present.

18   JUDGE CRAWFORD: Certainly. They're not going to be a part of

19   the record.

20   MR. JURGOVAN: Great, thank you.

21   JUDGE CRAWFORD: Thank you.

22   JUDGE LORIN: Thank you.

23   MR. JURGOVAN: Okay, basically turning to page 1, we see the, the

24   cattle -- the beef cattle marketplace. It's been invented by Dr. Shuler of

25   AgSpan, and on the left-hand side we see the buyer interface, so on the

1   right-hand side the producer interface, and on the top the cattle information

2   server, and all of these units are connected together via a network.

3   This creates a marketplace between alliances and feed yards that are

4   purchasing cattle and producers and veterinarians that are actually producing

5   the cattle. And so the cattle information server is basically the, the

6   intermediary between those two entities. Using the buyer interface or the

7   producer interface, the producer or the buyer can specify a supplier demand

8   profile that includes the pre-conditioning program for the cattle in question.

9   And pre-conditioning program is one of, of numerous protocols or criteria

10 that exists that define the breeding, the feeding, the health and the

11 management of cattle prior to slaughter.

12   If we turn to claim 1 on the following page, we see here this is a

13 method claim and it recites in a beef cattle marketplace with a buyer

14 interface and producer interface and a cattle information server, each of

15 which are connected to the other by network. A "receiving information

16 defining a plurality of demand profiles at the cattle information server from

17 the buyer interface, wherein at least one of the demand profiles specifies a

18 pre-conditioning program for a group of cattle . . . ."

19   It was amended to state that a pre-conditioning program comprises

20 "any of numerous protocols or criteria that govern the breeding, feeding,

21 management, and health of cattle prior to slaughter . . . ." Similarly, the

22 cattle information --

23   JUDGE MCCARTHY: Counsel.

24   MR. JURGOVAN: I'm sorry.

1   JUDGE MCCARTHY: Is pre-conditioning program specifically

2   defined anywhere in the specification?

3   MR. JURGOVAN: It is, and those of ordinary skill in the art know

4   what that is. It's the protocol that governs how that cattle was bred, how it's

5   fed throughout it's lifespan, how it's managed, and health of the -- how it's

6   been inoculated and received, you know, growth hormone implants and so

7   forth.

8   JUDGE MCCARTHY: Is there any evidence in the record

9   concerning the, the, the general knowledge of those skilled in the art?

10   MR. JURGOVAN: I believe there is, but -- there is a paragraph or

11   two in the specification itself that talks about this. I can direct you to exactly

12   where it is if you have a moment. Okay, it's on the bottom of page 9

13   through page 10. It has a discussion about what the pre-conditioning

14   program is on.

15   JUDGE MCCARTHY: Thank you.

16   MR. JURGOVAN: Sure.

17   JUDGE LORIN: I have a question about your pre-conditioning

18   information. Is this something that's commonly used in marketing of cattle?

19   MR. JURGOVAN: Not as it's -- not in this marketplace context

20   where you're actually creating a demand profile and, for example, you're a

21   feed lot you could actually use this system to, to find that, that the pre-

22   conditioning program for the cattle that you're interested in.

23   JUDGE LORIN: No, I don't mean with your system. I mean just

24   normally in the marketing of cattle, in the supply and demand in the

25   marketplace for cattle? Or is the information about the preconditioned cattle

4

1 a type of information that would be solicited or would be of interest within,

2 within the marketplace?

3 MR. JURGOVAN: I don't know. I mean, I suppose on an individual

4 basis between, you know, for example, a rancher and, and a producer.

5 Perhaps they talk about those things, but I would -- in, in a commodity

6 marketplace or a trading system, if you look at the Chicago Board of

7 Exchange you won't see that sort of information. It's all, you know, cattle.

8 The cattle are all grouped together and there's really no effort to, to define

9 them separately, what they are, where they originated from, what their

10 breeding is, what their, their management is, and so forth.

11 So, that is -- the state of things is actually to, to be more general about

12 what the -- say it's a head of cattle and that's it. That's what we're trading

13 in the marketplace to, to speed up the efficiency of the market.

14 So the more information and criteria that you provide to, to define

15 what, what you're interested in, the more it slows down trading, and that's,

16 that's contrary to the normal way of thinking about, about cattle. But, you

17 know, normally you think about cattle as a commodity. This marketplace is

18 more bringing it into a specialty item. We're interested in, in buying and

19 selling certain types of cattle under the pre-conditioning programs.

20 So claim 1 also recites receiving information for the supply profile

21 that's again similarly defined with the pre-conditioning program. The cattle

22 information server will compare the supply profile and the demand profiles

23 automatically and then it provides an indication to the buyers and the sellers

24 if there's a match between profiles.

1   Now claim 5 is similar to claim 1. It's a system claim. Claim 9 has a

2   little bit of a difference into it. It has a step of receiving information

3   defining a supply profile from a cattle information server, again, defined

4   using the pre-conditioning program, but also has a verification by a third

5   party of the pre-conditioning program for the identified group of cattle.

6   So in other words, the veterinarian, for example, can use this interface

7   to actually certify that those cattle were, were in fact subjected to the

8   specified pre-conditioning program. The -- that, that supply profile is then

9   stored and the carcass characteristics of the cattle are also stored in the cattle

10   information server, and those are correlated together so now we have

11   information about the, the cattle care -- the carcass characteristics and also

12   the pre-conditioning in the programs.

13   So the key points about the, the claimed invention, one, pre-

14   conditioning programs are recited in all of the claims, and that's a key

15   difference between the claimed invention and the cited art. Now the supply

16   profiles and the demand profiles are all defined according to pre-

17   conditioning programs.

18   And again, pre-conditioning programs is one of the protocols or

19   criteria regarding the breeding, the feeding, management, and health of that

20   cattle prior to slaughter.

21   JUDGE MCCARTHY: Would it be sufficient to constitute a

22   preconditioning program to have a protocol or criteria governing any one of

23   breeding, feeding, management, and health?

24   MR. JURGOVAN: Well, because of the use of the word "and" I

25   would say not. It has to have all four of those, those aspects to it to be a pre-

6

1 conditioning program. The cattle information server is the matchmaker. It
2 is, is what compares supply and demand profiles and determines if they're a
3 -- there's a match. So this is not a system where it's a pass-through of offers
4 from, from, you know, the supplier to, to the producers that are -- rather,
5 between the buyers and sellers.
6   The cattle information server is doing the matching. It is not actually
7 the passing though information between buyers and sellers directly. The
8 cattle information server does not -- it's not a broadcast conduit, in other
9 words between buyers and sellers.
10   The third thing is the verification by the third party. There are many
11 communities the veterinarian is the trusted entity, and by incorporating the,
12 the veterinarian and enabling the veterinarian to interface with the system
13 the buyers and sellers are assured that the pre-conditioning programs are in
14 fact -- were in fact implemented on the cattle in question.
15   Among the citations one is, is Bi. That's the primary reference that's
16 been relied upon by the Examiner. It's a computer matching system that has
17 a database and offer creation program for creating an offer entity in the
18 database. And it has a search engine for comparing search criteria
19 requirements input by user with offers existing in the database. Matching
20 results are, are ranked by confidence and in the search criteria requirement
21 may be defined by multiple elements including the product description,
22 market position. In other words, whether it's the buyer or seller or both that
23 are offering the information, the date of the offer, the date of the delivery
24 offer and price and volume. Ordish is a --

1   JUDGE MCCARTHY: Counsel, if I might turn your attention to an
2 example that's given late in the Bi patent particularly with reference to
3 Figure, Figure 15. They talk about the sale of tennis shoes.
4   MR. JURGOVAN: Um-hum.
5   JUDGE MCCARTHY: And I would direct you attention to the
6 beginning of Column 13, and that specifies that you may have -- specify,
7 say, white or blue tennis shoes.
8   MR. JURGOVAN: Correct.
9   JUDGE MCCARTHY: Doesn't that get into the distinctive features
10 of the product as opposed to merely conditions of sale or conditions of
11 delivery?
12   MR. JURGOVAN: Well, that, that -- their product attributes the
13 product has but they don't necessarily indicate anything about its origination
14 in the patent, and it certainly isn't cattle, cattle-related, doesn't relate to
15 breeding, feeding, health or management of cattle.
16   JUDGE MCCARTHY: So what is distinctive about your, your
17 system is that it is specific to the, the, the cattle market?
18   MR. JURGOVAN: That's correct. Very specific. Very specialized --
19   JUDGE MCCARTHY: That it's an application of, of a matching
20 system to the cattle market?
21   MR. JURGOVAN: Well, the cattle information server does use
22 matching, but I wouldn't say that, that Bi is necessarily a disclosure that, that
23 would encompass what, what's claimed. It's not, it's not matching
24 supply/demand profiles defined by pre-conditioning programs for cattle.

1   JUDGE MCCARTHY: But it is matching product profiles and search

2 criteria which, which can be used to, to, to match, to match products with,

3 with requirements.

4   MR. JURGOVAN: Yes, according to, to what the user happens to

5 specify. There's no guidance into here as to what the user should specify in,

6 in creating an offer.

7   JUDGE MCCARTHY: So you're saying that there's no guidance in

8 here to apply a system like this to the cattle market?

9   MR. JURGOVAN: I, I think it's, it's a stretch to apply it to the cattle

10 market.

11   JUDGE LORIN: Am I, am I understanding your position correctly,

12 that the match-making system itself, the computerized matchmaking, that's

13 in and of itself irrespective of what industry it's going to be applied to is, is

14 known in the art?

15   MR. JURGOVAN: Well, Bi would suggest that, that it is in its

16 context, but I would suggest that sort of thinking and that sort of approach is

17 really piecemeal examination. That's, that's taking the technology out of

18 context and saying okay, this piece was known. You know, as you know

19 under 103(a) both the prior art and the, and the claimed invention must be

20 considered as a whole. So taking pieces out like that and saying well, I got

21 this piece absent any motivation to combine clearly, I believe, is not

22 permissible under, under 103(a).

23   JUDGE MCCARTHY: But how would systems such as these be

24 specific to, to a particular market or, or to a particular market in a way that,

25 that would not suggest application to the cattle market?

1 MR. JURGOVAN: Well, it's -- there simply -- to give you an

2 analogy by -- if I say the invention is a, is a widget or an invention is

3 composed of atoms and then I'd find what the widget is that's composed of

4 atoms. Because I said, you know, something is composed of atoms doesn't

5 mean that that necessarily discloses something that is not a widget.

6 In other words, the disclosure of Bi is so general that it, it's hard --

7 there, there's -- it's impossible to make any connection to a preconditioning

8 program for cattle as defined and as claimed. I, I just don't see it there.

9 JUDGE MCCARTHY: But wouldn't Gransbery's article suggest that

10 at least breeding is something that if you were setting up a marketplace for

11 cattle that you would be interested -- that a buyer would be interested in

12 knowing?

13 MR. JURGOVAN: Well, Bi -- that Gransbery article doesn't mention

14 anything about cattle marketplace. It's basically a reporter going out and

15 interviewing a number of people in the cattle industry, and, and they have,

16 you know, a number of quotes which aren't really getting towards, you

17 know, what we define as a pre-conditioning program for cattle in the claims.

18 What it, what it -- you know, to give you some of the quotes -- the title of

19 the article is, "How Does One Sell Bulls in a Bear Market -- Cattle Market?"

20 So there, there's, you know -- the issue that was being addressed in that

21 article, it says, you know, here's some of the answers that were given:

22 Produce the cattle that is trending towards both the consumer and the

23 packers' mandate. "A terminal cross with Piedmontese produces a superior

24 product in palatability and more red meat." One, one interviewee says well,

1   "[y]ou'd better have good bulls." Another one says, "give a competitive

2   edge to the buyer."

3   JUDGE LORIN: We've read the article, thank you.

4   MR. JURGOVAN: So the point is just that there's no mention of any

5   beef marketplace in that Gransbery article. There's no mention of any

6   supplier demand profiles defined by pre-conditioning programs as defined

7   and as claimed. And there's no mention of any technology implementation

8   whatsoever. I see no suggestion or motivation that would have led a person

9   of ordinary skill in the art to be anything but confused in reading Gransbery

10   and Bi and Ordish together. It just -- I don't see the motivation to combine.

11   JUDGE LORIN: When you say that a person of ordinary skill in the

12   art, what art are you talking about?

13   MR. JURGOVAN: Well, it's, it's the art of, you know, cattle. You

14   know, breeding, feeding, management and, and health -- cattle, cattle

15   husbandry.

16   JUDGE LORIN: So one of ordinary skill in that art would not have

17   known -- would not have been led to employ computerized matching system

18   -- the known computerized matching system in the prior art to that industry?

19   MR. JURGOVAN: Well, that's, that's questionable. I mean, it

20   doesn't -- it, it exists in commodities trading for cattle. I mean, there are

21   trading systems -- computerized trading systems for cattle commodities, but

22   they're not in, in the marketplace. We're talking about between the

23   producer and the feed lot, for example, there's no such thing. There is no

24   marketplace today in that segment.

25   JUDGE LORIN: So you have, you have a --

1   MR. JURGOVAN: No automated --

2   JUDGE LORIN: There's, there's a nuance -- there's another nuance

3 to your argument then that the marketplace itself, irrespective of the

4 computerized system that you're applying -- that you're employing, that

5 marketplace doesn't exist?

6   MR. JURGOVAN: It doesn't. This, this system does not exist in the

7 market today. And, and what, you know, what it would enable is, you know,

8 effectively communication through the market between the producers and

9 the suppliers enabling them to, to be more efficient and to, to, you know,

10 produce and, and breed the kind of cattle that, that, you know, the, the feed

11 lots are looking for.

12   JUDGE LORIN: Which is why you're emphasizing this pre-

13 conditioning program?

14   MR. JURGOVAN: Exactly, exactly.

15   JUDGE MCCARTHY: But there are mechanisms in place currently,

16 if I would -- not computerized mechanisms currently in place by which

17 cattle are, are marketed to, to feed lots or, or to processors.

18   MR. JURGOVAN: Yeah, I -- you know, I would say word of mouth

19 certainly. I mean, there's some feedback there, but it's not, it's not efficient.

20 It's not computerized. It's not --

21   JUDGE MCCARTHY: But even if there's no information going back

22 to the breeders or to the, or to the growers there, there's still a marketplace

23 that allows these cattle to be sold upstream.

24   MR. JURGOVAN: Well, once they get to the -- out of the feed lot

25 and then they're, they're sold on the Chicago, you know, Board of

1 Exchange, yeah, there, there is a market there. You know, the carcass --

2 once the carcasses are processed through the slaughter house, then those

3 carcasses are, are, are actually exchanged on the Chicago Board of

4 Exchange, for example.

5   And then finally the, the claims 9 through 11 again deal with

6 that verifying step where the veterinarian can verify that the, the

7 preconditioning program has in fact been carried out on the cattle in

8 question. Pratt -- it's a system and method with the objective of enabling

9 accurate and efficient accumulation, recording, and correlation of a historical

10 data of feed lot performance and carcass data for each animal and the

11 transmission of such data to the producer for use in genetic selection and

12 breeding of future animals for beef production and to the feed lot for

13 improving the accuracy of performance feed and marketing projections for

14 future animals of similar characteristics to the feel lot.

15   Pratt is used strictly in a feed lot. It contains no mention of any

16 network and it's a feed lot business system computer. It is instead connected

17 directly to various sensors, for example, cattle sensors, for example, cattle

18 weighing equipment, back fat measurement equipment in the feed lot itself.

19 So again the deficiencies of these citations, none of them define a demand or

20 supply profile with pre-conditioning programs that include protocol or

21 criteria governing the breeding, feeding, health, and management of cattle

22 prior to slaughter.

23   And there's no cattle information server that compares and notifies the

24 buyer/producer interface to -- that there's a match between supply and

25 demand profiles based on the pre-conditioning program. The Examiner

1 admits that Bi does not disclose the step of, of -- wherein the matching

2 system is done with respect to cattle market. Now that's in the Answer,

3 page 4 and at page 6. Bi does not disclose demand and supply profiles

4 supplying a pre-conditioning program comprising any of the numerous

5 protocols or criteria that govern the breeding, feeding, management, and

6 health of cattle prior to slaughter. There again the Examiner admits that

7 that's, that's true, that Bi does have that deficiency at pages 4 and 6 of the

8 Answer.

9   JUDGE CRAWFORD: Excuse me. We're kind of running out of

10 time.

11   MR. JURGOVAN: Okay. I'm sorry.

12   JUDGE CRAWFORD: Can you get to what you necessarily have to

13 have us know?

14   MR. JURGOVAN: Okay. Well, I think we can also address the fact

15 that the Examiner admits that Bi doesn't disclose the verifying, receiving,

16 storing, and correlating steps of claim 9. And, you know, for a number of

17 reasons there's no motivation to combine Bi, Ordish, and Gransbery. One,

18 you know, again the pre-conditioning program is not mentioned in any of

19 those references. Ordish greatly limits the, the information to be contained

20 in an offer. It's a commodities based trading system and its approach is

21 counter to the claimed invention which actually provides more information

22 rather than less to, to generate trading efficiency.

23   Ordish uses a broadcast technique from buyer to seller, or vice versa,

24 that's not used in the claimed invention. Ordish deals with trading

25 instruments which are not cattle. And then also when viewed as a whole,

14

1   Gransbery does not lead one to, to, to modify Bi or Ordish in a, in an attempt

2   to, to obtain the claimed inventions.

3   So the only motivation is in the applicant's disclosure, and I think

4   with that I will close.

5   JUDGE CRAWFORD: Judge Lorin, you have questions?

6   MR. JURGOVAN: I, I very much appreciate your time.

7   JUDGE CRAWFORD: Judge McCarthy? Okay, thank you.

8   (Whereupon, the hearing concluded on October 22, 2008.)